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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JACK GORDON and JOSEPH DALY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit Court of Appeals which, contrary to the prior decisions of this Court and other Circuits, held that a federal District Court may direct a partial verdict *against* a criminal defendant with respect to an essential element of the crime?

2. Should this Court review the decision of the Ninth Circuit Court of Appeals in order to formulate a constitutionally valid test for distinguishing between questions of law within the province of the trial court and questions of fact within the province of the jury?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JACK GORDON and JOSEPH DALY petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On Marych 16, 1981, the Ninth Circuit Court of Appeals entered its panel opinion affirming the conviction of the Petitioners of one count of violating 18 USC §371: conspiracy to travel in interstate commerce and use facilities in interstate commerce to carry on an unlawful activity.

The Opinion has been officially reported at 641 F.2d 1281 and is set out in full in Appendix A.

Petitioners petitioned the Court of Appeals for a rehearing. The Court of Appeals denied a rehearing by an Order entered on May 4, 1981. That Order is set out in full in Appendix B.

Both petitioners are at liberty on bail pending disposition of this Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of this Court to review the decision of the Ninth Circuit Court of Appeals is granted by 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 2, Paragaph 3 of the United States Constitution provides in pertinent part that:

> "The trial of all Crimes, excepting Cases of Impeachment, shall be by Jury; . . ."

Amendment VI of the United States Constitution provides in pertinent part that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ."

Nevada Revised Statutes (NRS) §197.010 provides in pertinent part that:

> "197.010 **Bribery of Executive or Administrative Officer.**

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the State, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer, shall be punished . . ."

NRS §197.020 provides in pertinent part that:

"197.020 **Bribery of other public officers.** Every person who shall give, offer or promise, directly or indirectly, any compensaiton, gratuity or reward to any person executing any of the fuction of a public officer other than as specified in NRS 197.010, 199.010 and 218.590, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of this powers or fuctions, shall be punished . . ."

STATEMENT OF THE CASE

On August 8, 1978, a Federal Grand Jury sitting in Las Vegas, Nevada, returned an indictment (appearing in Appendix C) against Petitioners and a third individual, Sol Sayegh. (Prior to trial, Sayegh's case was severed from that of Petitioners.) The indictment charged three counts but at trial the District Court dismissed the first two, both of which alleged substantive violations of the Travel Act, 18 USC §1952. Consequently, only Count III was fully tried and submitted to the jury.

Count III charged a violation of 18 USC §371: conspiracy to travel in interstate commerce and to use the facilities of interstate commerce to carry on an unlawful activity. The "unlawful activity" alleged as the object of the conspiracy was conducted purportedly violative of a state

criminal statute (commonly referred to as "the predicate state statute"). In the indictment here the predicate state statute was referred to generally: "Bribery of a Public Officer, in violation of the laws of the State of Nevada." The objects of the conspiracy to bribe were two members of the Nevada Gaming Commission: Chairman Harry Reid and Commissioner George Swarts.

No Nevada statute expressly criminalizes bribery of a member of the Nevada Gaming Commission. Nevada does have, however, criminal statutes prohibiting bribery of a legislator (NRS §218.590), bribery of a judicial officer (NRS §199.010), bribery of an executive or administrative officer (NRS §197.010), and bribery of any "public officer" not covered by the three other bribery statutes (NRS §197.020).

At trial the Government was, as always, faced with the need to establish by competent evidence each element of the crime charged in the indictment. Here that meant that the Government had to establish, among other things, (1) that Reid and Swarts were members of the Nevada Gaming Commission *and*(2) that a member of the Nevada Gaming Commission is a public officer within the meaning of one of the four Nevada bribery statutes. Consequently, at trial, the Government had both Reid and Swarts testify that they were members of the Nevada Gaming Commission (the first element). Further, Reid testified that the Nevada Gaming Commission is an administrative agency within state government, that a member is appointed by the Governor, and that his functions are to enforce gaming laws enacted by the state legislature and to promulgate regulations thereunder.

Petitioners do *not* contend that this testimony was insufficient, if believed by a properly instructed jury, to

establish that a member of the Nevada Gaming Commission is an executive or administrative officer within the meaning of NRS § 197.010. The whole problem, however, is that the District Court took from the jury this issue. When counsel met with the District Judge to settle on the jury instructions, Petitioners' counsel requested that the District Court define "executive or administrative officer" (NRS § 197.010) and "public officer" (NRS § 197.020) for the jury and then charge the jury to determine whether a member of the Nevada Gaming Commission feel within the scope of either definition.

Initially the District Judge acknowledged the correctness of Petitioners' position. He stated:

> "I'm not going to instruct the jury, though, one way or another on whether he is a public officer, because I don't think that it's been properly established by the evidence.
>
> * * *
>
> But I think, in view of the fact that all we have is testimony from Harry Reid on direct that he's the Chairman of the Gaming Commission, the jury, of course, can infer from that that he is a public officer.
>
> * * *
>
> Then, on cross, we have him admitting he is an executive or administrative officer. There was some discussion on that. I think that there's room, and I think it's appropriate for defendants to argue, if they want, that he's not an executive administrative officer within the meaning of the statute."

Thereafter, however, the District Court reversed its position and decided to resolve this particular issue itself. The Court asserted that Petitioners were attempting to argue "legal" matters to the jury, that definitions would create confusion in the minds of the jurors, and that it would be a miscarriage of justice to allow that. Consequently, the Court

instructed the jury that *as a matter of law* the payment of a bribe to a Nevada Gaming Commissioner is an unlawful activity under the laws of Nevada. In this fashion the District Court effectively granted the Government a partial directed verdict against the defendants in a criminal case.

On the appeal of this issue, the Ninth Circuit affirmed on the basis of an *ipse dixit:*

> "The fundamental flaw in [Petitioners'] argument is that the question whether Nevada Gaming Commissioners fall into one statutory classification or another is a question of law for the Court rather than a question of fact for the jury."[1]
>
> 641 F.2d at 1288-89.

The Ninth Circuit provided no analysis in support of its conclusion.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT HAS APPROVED THE CLEARLY UNCONSTITUTIONAL PRACTICE OF GRANTING A PARTIAL DIRECTED VERDICT AGAINST A DEFENDANT IN A FEDERAL CRIMINAL TRIAL, THEREBY CREATING A CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OF OTHER CIRCUIT COURTS.

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[1]The Ninth Circuit's *ispe dixit* even misstated Petitioners' position. The questions was not *which* category of public officers (created by the four Nevada bribery statutes) Nevada Gaming Commissioners fall into but *whether* they fall into any such category.

In *United Brotherhood of Carpenters v. United States,* 330 US 395, 408-09 (1947), this Court stated the rule that prevailed unchallenged until the decision of the Ninth Circuit in this case. That rule is:

> "[A] judge may not direct a verdict of guilty no matter how conclusive the evidence."

The decisions of other Circuits have been consistent with this Court's pronouncement in *United Brotherhood of Carpenters* and therefore inconsistent with the Ninth Circuit's decision below. *E.g., United States v. Ragsdale,* 438 F.2d 21 (5th Cir. 1971), *United States v. Skinner,* 437 F.2d 165 (5th Cir. 1971) (and cases cited therein); *Roe v. United States,* 287 F.2d 435 (5th Cir. 1961). *Roe* provides perhaps the best example of this conflict. In that criminal case, the District Court instructed the jury that, as a matter of law, mineral leases on specific pieces of property sold and delivered through the mails were "investment contracts" and therefore "securities" within the scope of the federal securities laws. In so ruling, the District Court relied upon two civil cases decided by the Supreme Court which held that the transactions at issue were "investment contracts" and therefore "securities." The defendants argued that the jury should have been instructed on the definition of "investment contracts," that the jury should have then determined the issue, and that the resolution of the issue by the District Court amounted to an impermissible partial directed verdict adverse to them. The Fifth Circuit agreed. It reviewed the evidence presented at trial and held that, as a matter of law, the evidence of the mineral lease transactions, *if credited,* would sustain a finding of an "investment contract." The Fifth Circuit held, however, that the initial resolution of the issue at trial was for the jury and not the

District Court. "That means that the trier of fact, here a jury, must determine the issue." 287 F.2d at 440.

The Fifth Circuit further explained that:

> "No fact, not even an undisputed fact, may be determined by the judge. A plea of not guilty places all in issue, even the most patent truths. In our federal system, the trial court may never instruct a verdit either in whole or in part."
> 287 F.2d at 440.

The Fifth Circuit strengthened that fundamental proposition in *Ragsdale, supra,* where it stated:

> "This circuit is firmly committed to what appears to be the universal rule, that no matter how conclusive the evidence, a court may not direct a verdict of guilt in whole or in part. Any such instruction would amount to plain error which would be noticed, even thought not assigned."
> 428 F.2d at 37.

The Ninth Circuit's position is diametrically opposed to that of the Fifth Circuit. Whereas the Fifth Circuit requires its District Courts to leave to a properly instructed jury application of the law (*e.g.*, "investment contract" or "public officer") to the evidence presented at trial (*e.g.*, regarding natue of a "mineral lease" or a "gaming commissioner"), the Ninth Circuit permits its District Courts to arrogate that task to themselves and thereby grant to the Government directed verdicts, in whole or in part, against criminal defendants. In short, a conflict exists between an opinion of the Ninth Circuit, on one hand, and the opinions of this Court and the Fifth Circuit, on the other hand.

II

IN ORDER TO PREVENT EROSION OF THE CONSTITUTIONALLY MANDATED ROLE OF JURIES IN FEDERAL CRIMINAL CASES, THIS COURT SHOULD ARTICULATE A CONSTITUTIONALLY VALID TEST FOR DISTINGUISHING BETWEEN QUESTIONS OF LAW (AND HENCE THE PROVINCE OF THE TRIAL JUDGE) AND QUESTIONS OF FACT (AND HENCE THE PROVINCE OF THE JURY).

The decision of the Ninth Circuit, below, demonstrates that a trial or appellate court, by unprincipled or careless use of the conclusory label "question of law," may deprive a criminal defendant in large measure of his right to a trial by jury. Although diligent and vigilant courts, as demonstrated by the Fifth Circuit's *Roe* decision, will not permit that to happen, the risk remains that it will happen as long as this Court remains silent on the issue cleanly presented by this case. What is needed, therefore, is a clear articulation by this Court that in any instance of even slight uncertainty regarding the law/fact distinction, the preference must be for the "fact" label in order to preserve uneroded the jury's constitutionally mandated role. This case provides an ideal vehicle for that purpose.

Unless this Court takes such a course, the wholly unsatisfactory condition described more than 80 years ago will continue, to the detriment of the constitutional guarantee of right to jury trial: a question is fact or law depending on whether the court, without guiding principle, chooses to treat it as one or the other. Fox, *Law and Fact,* 12 Harv.L.Rev. 545, 551 (1899).

Respectfully submitted:

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Jack GORDON, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Joseph DALY, Defendant-Appellant.

Nos. CA 79-1661, CA 79-1664.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 12, 1980.

Decided March 16, 1981.

Defendants were convicted in the United States District Court for the District of Nevada, Roger D. Foley, J., of a conspiracy to violate the Travel Act, and they appealed. The Court of Appeals, Muecke, District Judge, sitting by designation, held that: (1) where the indictment charging defendants identified the unlawful activity as "Bribery of a Public Officer in violation of the Laws of Nevada," gave a detailed statement of defendant's alleged behavior in that regard and listed the objects of the bribe attempt both by name and by title, the failure of the Government to cite the

proper predicate statute did not prejudice the defendant; (2) the fact that the grand jury relied on the Nevada statute prohibiting bribery of "other public officers" in returning their indictment and that the conviction was based on the Nevada statute prohibiting bribery of "executive or administrative officer" did not amount to fatal variance between indictment and proof where there was no possibility that the grand jury was thinking of one public officer and the petit jury of another, the language of the indictment supported a conviction upon the statute governing "executive or administrative officers" and the indictment specifically referred to the objects of the bribe attempt both by name and by official title; and (3) when the district court refused to instruct the jury on the definition of the term "public officer," as used in the indictment, and, instead, read the statutes prohibiting bribery of "administrative or executive officers" to the jury, such conduct did not take from the jury the factual question of whether the objects of the bribery attempt were Nevada Gaming Commissioners but, rather, merely instructed the jury on the legal consequences of such a determination.

Affirmed.

* * * * * *

Appeal from the United States District Court for the District of Nevada.

Before TRASK and FLETCHER, Circuit Judges, and MUECKE,* District Judge.

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*Honorable C. A. Muecke, Chief Judge, United States District Court for the District of Arizona, sitting by designation.

MUECKE District Judge.

The present appeals follow appellants' convictions for violation of 18 U.S.C. §371, conspiracy to violate the Travel Act.

On August 8, 1978, a federal grand jury sitting in Las Vegas, Nevada, returned a three-count indictment against appellants herein, and a co-defendant, charging them with two counts of Travel Act bribery and one count of conspiracy.

The Travel Act, 18 U.S.C. §1952, provides felony sanctions for

> (a) Whoever travels in interstate or foreign commerce or uses a facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs . . . (3) . . . .

Subsection (b) of §1952 defines "unlawful activity" as including "extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

Counts I and II of appellants' indictment charged them with placing an interstate phone call and with engaging in interstate travel with intent to "promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: Bribery of a Public Officer, in violation of Nevada Revised Statutes, Section 197.020," and with thereafter performing certain other acts for the same purpose. The public officers in question were identified as Nevada Gaming Commissioners.

Count III, the conspiracy count, covered the same facts alleged in Counts I and II. It did not, however, specifically state that the unlawful activity comprising the purpose of appellants' conspiracy was the violation of N.R.S. §197.020. Count III simply referred to "Bribery of a Public Officer, in violation of the laws of the State of Nevada . . . ."

At the close of the Government's case-in-chief, the trial court granted appellants' motions for judgment of acquittal with respect to Count I and II. The court's order was based on its finding that Nevada Gaming Commissioners, the objects of appellants' bribery attempts, were not "other public officers" within the meaning of N.R.S. §197.020, the statute cited in the indictment.[1] The court ruled that Gaming Commissioners were in fact "executive or administrative officers," and that under Nevada law, the bribery of such officials is proscribed by N.R.S. §197.010.[2]

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[1]N.R.S. §197.020 provides as follows:

Bribery of other public officers. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as specified in NRS 197.010, 199.010 and 218.590, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 10 years, and may be further punished by a fine of not more than $5,000.

[2]N.R.S. §197.010 provides as follows:

Bribery of executive or administrative officer. Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 10 years, and may be further punished by a fine of not more than $5,000.

The trial court denied appellants' motion for judgment of acquittal as to Count III, however, for the reason that the conspiracy count did not specifically limit itself to N.R.S. §197.020. The court subsequently instructed the jury with respect to Count III using §197.010 as the predicate state offense for the violation of 18 U.S.C. §1952; it refused to read §197.020 to the jury, and refused to permit appellants to argue that the Government had relied on the wrong statute. We affirm.

Facial Validity

While appellants have not pressed the issue, it is relevant to observe that the Government's failure to cite the predicate state statute did not, in and of itself, render Count III of the indictment invalid.[3]

[1] An indictment must furnish the defendant with a sufficient description of the charge against him to enable him to prepare his defense (the notice function), and to enable him to plead double jeopardy against a second prosecution (the double jeopardy function). *See United States v. Anderson,* 532 F.2d 1218, 1227 (9th Cir.), *cert. denied* 429 U.S. 839, 97 S.Ct. 111, 50 L.Ed.2d 107 (1976). *See also Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). To these ends, Rule 7(c)(1), Federal Rules of Criminal Procedure, provides that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged," and that it shall "state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated."

[3]Count III did cite 18 U.S.C. §1952 as well as 18 U.S.C. §371.

[2] While correct citation to the relevant statute is always desirable, both the Federal Rules and the cases interpreting them make it clear that an error or omission is not necessarily fatal.

Rule 7(c)(3), Federal Rules of Criminal Procedure, provides that "error in the citation or its omission shall not be ground for dismissal of the indictment . . . or for reversal or a conviction *if the error or omission did not mislead the defendant to his prejudice.*" (Emphasis added).

In *United States v. Clark,* 416 F.2d 63 (9th Cir. 1969), a Ninth Circuit decision relying on Rule 7(c)(3), this Court upheld the district court's refusal to dismiss an indictment where appellant, who was accused of submitting a false travel voucher to the federal government, had been charged under 18 U.S.C. §287 instead of 18 U.S.C. §1001. In so doing, the Court stated:

> The statutory citation is not, however, regarded as part of the indictment. . . . We read Rule 7(c) to permit the citation of a statute on an indictment to be amended where, as here, the facts alleged will support such a change.

Id. at 64.[4]

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[4]*See also Steinert v. United States District Court for District of Nevada,* 543 F.2d 69, 70 (9th Cir. 1976) (A contempt case in which the Government incorrectly cited 18 U.S.C. §402 instead of 18 U.S.C. §401. Referring to Rule 7(c)(3), the court found that defendant was always aware of the charge against him and that he was not prejudiced by the miscitation); *United States v. Wuco,* 535 F.2d 1200 (9th Cir. 1976), *cert. denied,* 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1979) (Noting the absence of prejudice, the court upheld a superseding indictment which erroneously classified the organic THC found in defendants' possession under 21 U.S.C. §812(c) Schedule I(c), which applies only to synthetic THC); *United States v. Shipstead,* 433 F.2d 368 (9th Cir. 1970) (A drug manufacturing case in which the indictment miscited 21 C.F.R. 320-3(b), the federal regulation designing the drug involved). *(continued)*

[3] We have not been referred to a case in which a Travel Act indictment was attacked for failure to cite the statute comprising the predicate "unlawful activity." The cases that do discuss § 1952 make it clear that the statutory language embodies all of the essential elements[5] and that reference to state law is necessary only to identify the type of unlawful activity involved.[6]

[4] In the present case, the allegations regarding appellants' use of facilities of interstate commerce and the

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(footnote continued from proceeding page)

In *United States v. Wagstaff*, 572 F.2d 270 (10th Cir. 1972), the Tenth Circuit Court of Appeals reversed the trial court's dismissal of an indictment that charged concealing and facilitating the transportation of an automobile imported contrary to law. Appellant had attacked the indictment on the grounds that it "did not specify the law that the importation violated in that it did not give the citation of the statute as is customary." *Id.* at 271. In concluding that the indictment was sufficient, the court referred to Rule 7(c) and reasoned that:

> the omission in the indictment did not have to do with a substantial element. The indictment sufficiently described the offense and the citation of the applicable statute was unnecessary.

Id. at 272.

[5] *See Marshall v. United States*, 355 F.2d 999 (9th Cir. 1966), *cert. denied*, 385 U.S. 815, 87 S.Ct. 34, 17 L.Ed.2d 54 (1966), *reh. denied*, 385 U.S. 964, 87 S.Ct. 388, 17 L.Ed.2d 309 (1966); *Turf Center v. United States*, 325 F.2d 793 (9th Cir. 1963).

[6] *See United States v. Rizzo*, 418 F.2d 71, 74 (7th Cir. 1969), *cert. denied, Tornabene v. United States*, 397 U.S. 967, 90 S.Ct. 1006, 25 L.Ed.2d 260 (1970). In *Rizzo*, defendant's Travel Act indictment specified the underlying state statute but failed to set forthe the *elements* of the state offense. The court held that the gravamen of a charge under 18 U.S.C. § 1952 is the violation of *federal* law (Use of an interstate facility with intent to violate state or federal law) and that "reference to state law is only necessary to identify the type of illegal activity."

Rizzo was primarily concerned that the indictment fulfill its double jeopardy and notice functions. These functions can be fulfilled, as in this case, if the indictment sets forth the "type of illegal activity," even though the specific statute is omitted.

unlawful activity to which it was related were set forth in the language of §1952. Count III identified the unlawful activity as "Bribery of a Public Officer in violation of the laws of Nevada," and gave a detailed statement of appellants' alleged behavior in this regard. The objects of appellants' bribe attempts, the Nevada Gaming Commissioners, were listed by both name and title.

Under these circumstances we do not find that the Government's failure to cite §197.010 could have prejudiced appellants. They were fully informed of the charges they faced.

Variance

[5] Appellants' primary contention is that the grand jury relied on §197.020 in returning their indictment,[7] and therefore, that conviction pursuant to 197.010 permits a variance between indictment and proof. This variance, argue appellants, violates their fifth amendment right to be tried only upon indictment by a grand jury.

The fifth amendment to the United States Constitution provides that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment of indictment of a grand jury." In a series of cases beginning with *Ex parte Bain,* 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887), the Supreme Court has invalidated attempts by the Government to avoid these restrictions through the actual or constructive amendment of a defendant's indictment. The Court has never gone so far, however, as to hold that the fifth amendment precludes amendment per se—without regard to possible prejudice. *See United States v. Dawson,* 516 F.2d

[7]Appellants allege that the Government admitted this at trial. The Government has not refuted this contention.

796 (9th Cir. 1975), *cert. denied* 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 80 (1975). Its decisions have been limited to circumstances where amendment might undermine a defendant's right to be tried only upon "presentment or indictment of a grand jury."

In *Ex parte Bain, supra,* defendant was indicted for submitting a false report "with intent to deceive *the comptroller of the currency and* the agent [of the comptroller of the currency] appointed [by the comptroller] to examine the affairs of said association." 121 U.S. at 4, 7 S.Ct. at 783. (Emphasis in original). The trial court struck the italicized portion of the indictment as surplusage, holding that it was neither material nor necessary to the charge. Emphasizing the possibility that one or more of the indicting grand jurors may have found probable cause to believe that defendant intended to deceive the comptroller—but not his agent, the Court held that defendant's fifth amendment right to be tried only upon indictment by a grand jury had been violated. 121 U.S. at 10, 7 S.Ct. at 786. Under the circumstances before the Court, amendment permitted the Government to sidestep the grand jury and deprive the defendant of its protective function:

> If it lies within the province of the court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.

Id. at 10, 7 S.Ct. at 786.

The Supreme Court reaffirmed the *Bain* principle in *United States v. Stirone,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960) and *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), both of which involved government efforts to amend the charging portion of an indictment. In *Stirone, supra,* the Court disallowed an amendment which alleged an alternative means by which the defendant had committed an essential element of his offense.[8] Similarly in *Russell, supra,* the Court rejected the Government's suggestion tha tits failure to allege a critical element of the offense could be remied by a bill of particulars.[9] In each case, the Court emphasized the

[8]Defendant had been indicted for violation of the Hobbs Act, 18 U.S.C. §1951, an essential element of which is interference with interstate commerce. The indictment charged one means of interference, but the trial court permitted the Government to allege and prove an alternative means. Citing *Ex parte Bain, supra,* the Court found that defendant's fifth amendment rights had been violated: "The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." 361 U.S. at 217, 80 S.Ct. at 273.

The rational underlying the decision in *Stirone* was the same as in *Baine*—the Court simply couldn't be sure that the grand jury would have returned the amended version of the indictment:

> But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with [interstate commerce in the manner subsequently alleged by the government]. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted soley on the charge made in the indictment the grand jury returned.

Id.

[9]Defendants were indicted pursuant to 2 U.S.C. § 192 for refusing to answer certain questions when summoned before a congressional subcommittee. The Court found that a critical element of the offense was that defendants' refusal relate to the subject under congressional inquiry. The indictment in question wholy failed to inform defendants in this

(continued)

possibility tha the grand jury mgiht not have returned the indictment in its amended form. *United States v. Stirone, supra* note 8; *Russell v. United States, supra,* note 9.

In contract to the above decisions, the present case does not involve an amendment to the charging portion of appellants' indictment. Neither does it involve circumstances where the grand jury might not have indicted under the amended allegations.[10]

Appellants' sole contention is that the grand jury relied on §197.020 as the predicate for its finding of a Travel Act violation and that the indictment was constructively amended to read §197.010. These statutes are identical

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regard, and thus failed "to fulfill its primary office—to inform the defendant of the nature of the accusation against him." 369 U.S. at 767, 82 S.Ct. at 1049. Moreover, the Court rejected the Government's suggestion that this inadequacy could be remedied by bills of particulars. Citing *Bain* and *Stirone,* the Court observed:

> A grand jury, in order to make the ultimate determination [of whether a defendant's refusal related to the subject under congressional inquiry], must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Id. at 770, 82 S.Ct. at 1050.

[10]It is in this regard that *United States v. Camp,* 541 F.2d 737 (8th Cir. 1976) and *United States v. Denmon,* 483 F.2d 1093 (8th Cir. 1973), cited by appellants, are distinguishable. In these cases, the indictment failed to allege an essential element of the offense for which the defendant was convicted. Under such circumstances, it is impossible to tell whether the grand jury would have returned an indictment. *See Ex parte Bain,* 121 U.S. at 10, 7 S.Ct. at 786; *United States v. Stirone, supra* note 8; *Russell v. United States, supra,* note 9.

with the exception that § 197.010, the statutue adopted by the trial court, proscribes the bribery of "executive or administrative officers," and § 197.020, the statute relied upon by the Government, applies to "other public officers." Had the change in statutes presented the possibility that the grand jury was thinking of one public officer, and the petit jury of another, the case would fall within the rule of *Ex parte Bain, supra.* Here, however, the language of the indictment clearly supports conviction upon § 197.010. It is evident from the wording of § 197.020 that "executive or administrative officers" under § 197.010 is merely a subdivision of the larger term "public officers." Moreover, since the indictment specifically referred to the objects of appellants' bribe attempts both by name and by official title, there is no question tha tthe grand jury and the petit jury were operating under the same set of facts.

This Court finds that the present circumstances are covered by Rule 52(a), Federal Rules of Criminal Procedure, which provides that "any . . . variance which does not affect substantial rights shall be disregarded." *See United States v. Friedman,* 593 F.2d 109, 116 (9th Cir. 1979); *United States v. Phillips,* 577 F.2d 495, 502 (9th Cir. 1978), *cert. denied,* 439 U.S. 831, 99 S.Ct. 107, 58 L.Ed.2d 125 (1978); *United States v. Anderson,* 532 F.2d 1218, 1222 (9th Cir. 1976), *cert. denied,* 429 U.S. 839, 97 S.Ct. 111, 50 L.Ed.2d 107 (1976).

In addition, the Supreme Court itself has ruled that

> It is wholly immaterial what statute was in the mind of the District Attorney when he drew the indictment, if the charges made are embraced by some statute in force. . . . We must look to the indictment itself, and if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute.

Williams v. United States, 168 U.S. 382, 389 18 S.Ct. 92, 42 L.Ed. 509 (1897). The reasoning of *Williams* was reaffirmed in the Court's 1941 decision of *United States v. Hutcheson*, 312 U.S. 219, 229, 61 S.Ct. 463, 464–65, 85 L.Ed. 788 (1941),[11] and has been consistently followed by this Court. *See United States v. Clizer*, 464 F.2d 121, 124 (9th Cir. 1972), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 697, 34 L.Ed.2d 673 (1972), *reh. denied*, 410 U.S. 948, 93 S.Ct. 1379, 35 L.Ed.2d 616 (1973).[12] *See also Steinert v. United States District Court for District of Nevada*, 543 F.2d 69, 70 (9th Cir. 1976); *United States v. Wuco*, 535 F.2d 1200, 1202 (9th Cir. 1976); *cert. denied*, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1976); *United States v. Clark*, 416 F.2d 63, 64 (9th Cir. 1969), all of which are discussed i note 4, *supra*, and accompanying text.

Not only does appellants indictment properly charge an offense under §197.010, they have failed to demonstrate any prejudice from the alleged variance.[13]

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[11]In *Hutcheson*, the Court stated that:

> In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment, but it may nevertheless come within the terms of another statute. *See Williams v. United States* . . . . 312 U.S. at 229, 61 S.Ct. at 464-65.

[12]In *Clizer*, appellant was charged with giving false testimony before a grand jury. His indictment, however, cited 18 U.S.C. §1621, perjury generally, rather than 18 U.S.C. §1623, false declarations before a grand jury or court. Citing *Williams v. United States, supra*, and *United States v. Hutcheson, supra*, the court upheld appellant's indictment.

[13]Appellants cite a line of cases from the Fifth Circuit which they claim contradict the position taken by this court. *See United States v. Prejean*, 494 F.2d 495 (5th Cir. 1974); *United States v. Beard*, 436 F.2d 1084 (5th Cir. 1971). *(continued)*

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In *Prejean, supra,* defendant had been indicted for violation of the Assimilative Crimes Act, 18 U.S.C. § 13, which adopts for each federal enclave the penal laws of the state where it is located. The state statute under which defendant was charged was Article 1389 of the Texas Penal Code—ordinary burglary. The facts proved at trial, however, established the more serious offense of burglary of a private residence at night, Article 1391.

The court found that the elements or ordinary burglary and of burglary of a private residence at night were different and that the penalty for the latter was "substantially harsher." 494 F.2d at 497. The court cited decisions of the Texas Court of Criminal Appeals to the effect that the two offenses were "separate and distinct" and noted that the Texas Court "on occasion has reversed convictions under indictments charging a violation of Article 1389 when the proof showed burglary of a private residence at night." *Id.* at 497-98.

Prejean is distinguishable from the present case in one major respect: the facts stated in the indictment did not sufficiently allege violation of Article 1391, the offense proven at trial. Conviction of Article 1391 under these circumstances was clearly impermissible. *Ex parte Bain, supra.* Since state law did not permit conviction of ordinary burglary upon proof of burglary of a private residence at night, a conviction could not be had under either statute.

United States v. Beard, supra, also involved the Assimilative Crimes Act. Defendant in *Beard* was indicted for embezlement under Article 1534 of the Texas Penal Code. Although it became obvious during trial that certain critical elements of Article 1534 were not present, the Government was permitted to proceed on the theory that the operative facts charged in the indictment sufficiently alleged violation of a "totally different and unrelated" statute, 18 U.S.C. § 661 (taking and carrying away the personal property of another with the intent to steal or purloin). 436 F.2d at 1084. The Court of Appeals for the Fifth Circuit reversed, stating:

> The government's theory of guilt under the two contradictory statutes would of course necessarily be completely dissimilar. No one can say whether the Grand Jury under the facts present would have indicted the appellant for violation of Title 18, U.S.C. Section 1661. All we know, is that the Grand Jury did not indict Beard under this section.

(continued)

Directed Verdict

Appellants' second assignment of error is closely related to their first.

Following an unsuccessful attempt to persuade the trial court to include Count III in its judgment of acquittal, appellants sought to take their variance argument to the jury. Appellants wanted both §§197.020 and 197.010 read to the jury; they wanted the court to instruct the jury as to the definition of the term "public officer", as used in the indictment; and they wanted to argue to the jury that the Government failed to prove that Gaming Commissioners were "public officers" as opposed to "administrative or executive officers." The court rejected this approach. It read N.R.S. §197.010 to the jury, refused to instruct them as to the definition of "public officer", and prohibited appellants from arguing variance.

[6] Appellants contend that by refusing to permit the jury to consider the question whether Nevada Gaming Commissioners are "other public officers," within the meaning of N.R.S. §197.020, or "executive or administrative officers," within the meaning of N.R.S. §197.010, the trial court denied appellants' sixth amendment right to have

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Id. at 1087.

Beard is easily distinguishable from the present case for the reason that the two statutes involved here are by no means "totally different and unrelated." Moreover, there is no question that the grand jury in this case would have indicted defendants for the offenses for which they were convicted.

Given these facts, it is unnecessary for this Court to discuss the validity of *Beard*'s inquiry into whether the grand jury would have found a violation of the particular statute for which the defendant was convicted. It is enough to say that the decisions of the Supreme Court emphasize the *facts* found by the grand jury, and asked whether they would support the defendant's conviction. *See e.g., Williams v. United States, supra.*

a jury determine each and every essential element of the offense.[14] Appellants argue that the trial court's ruling amounted to a directed verdict on the issue, and that directed verdicts in criminal cases are prohibited, even when the court's resolution of the issue is almost certainly correct. *See United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947); *United States v. Ragsdale,* 438 F.2d 21, 27 (5th Cir. 1971), *cert. denied,* 403 U.S. 919, 99 S.Ct. 2231, 29 L.Ed.2d 696 (1971); *United States v. Skinner,* 437 F.2d 164, 169 (5th Cir. 1971); *Brooks v. United States,* 240 F.2d 905 (5th Cir. 1957).

With the exception of *United States v. Ragsdale, supra,* the cases cited by appellants, involved instances where the trial court had taken a question of fact from the jury. In *Ragsdale,* the court found that there had been no directed verdict where the trial court informed the jury that the evidence was uncontroverted and that *if* they chose to believe it, the elements of the offense had been established. 438 F.2d at 27.

[7] The fundamental flaw in appellants' argument is that the question whether Nevada Gaming Commissioners fall into one statutory classification or another is a question of law for the court rather than a question of fact for the jury. *See e.g., United States v. Wuco,* 535 F.2d 1200, 1202 (9th Cir. 1976), *cert. denied,* 429 U.S. 978, 97 S.Ct. 488, 50

[14]Appellants also argue that by reading N.R.S. § 197.010 to the jury, the court constructively amended the indictment to charge "bribery of executive or administrative officer" rather than "'bribery of public officers" and that such amendement is prohibited by *Ex parte Bain, supra,* and *Russell v. United States, supra.*

This Court's response to appellants' variance argument is equally applicable here; appellants' position is without merit.

L.Ed.2d 586 (1976); *United States v. Crockett*, 506 F.2d 759, 761–62 (5th Cir. 1975), *cert. denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975). *United States v. Ragsdale*, *supra*, is closer to the present case. Appellants do not contend that the court took the factual question whether the objects of appellants' bribery attempts were Nevada Gaming Commissioners from the jury. It merely instructed the jury as to the legal consequences of such a determination. Since this was a question of law, appellants' argument is unsound.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JACK GORDON, Defendant-Appellant.	No. CA 79-1661
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOSEPH DALY, Defendant-Appellant.	No. CA 79-1664

ORDER

Before: TRASK and FLETCHER, Circuit Judges, and MUECKE, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

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(702) 385-6336

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	Cr. LV 78-73, RDF
v.	VIOLATION:
JACK GORDON,	18 U.S.C. §371—Conspiracy; 18 U.S.C. §1952—Interstate Travel in Aid of Racketeering; 18 U.S.C. §—Aiding and Abetting.
SOL SAYEGH, and	
JOSEPH DALY,	
Defendants.	

INDICTMENT

COUNT I
(Interstate Travel in Aid of Racketerring; Aiding & Abetting)

The Grand Jury charges: T H A T

On or about July 25, 1978, in the District of Nevada and elsewhere, JOSEPH DALY, acting on behalf of and at the knowing direction of JACK GORDON and SOL SAYEGH, did, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely: Bribery of a Public Officer, in violation of Nevada Revised Statutes, Section 197.020, wilfully and unlawfully use and cause to be used a facility in interstate commerce, that is, a telephone, from the State of Nevada to the State of California, and thereafter JOSEPH DALY, JACK GORDON and SOL SAYEGH did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following:

On or about July 25, 1978, JOSEPH DALY, acting on behalf of and at the knowing direction of defendants JACK GORDON and SOL SAYEGH, in a conversation with one Robert Broadbent, wilfully and unlawfully attempted to influence Nevada Gaming Commissioner George Swarts in his official capacity in regard to his vote against Commission approval of a new gaming device, in violation of Nevada Revised Statutes, Section 197.020.

On or about July 28, 1978, defendant JACK GORDON wilfully and unlawfully offered a sum of money to Harry M. Reid, Chairman of the Nevada Gaming Commission, in exchange for favorable official action on the part of Harry M. Reid in regard to Commission approval of a new gaming device, in violation of Nevada Revised Statutes, Section 197.020.

On or about July 31, 1978, defendants JACK GORDON and SOL SAYEGH, wilfully and unlawfully delivered a sum of money to Harry M. Reid with the intent to influence the official actions of Harry M. Reid as Chairman of the Nevada Gaming Commission, in regard to Commisison approval of a new gaming device, in violation of Nevada Revised Statutes, Section 197.020.

All in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT II

(Interstate Travel in Aid of Racketeering; Aiding & Abetting)

The Grand Jury further charges: T H A T

on or about July 26, 1978, in the District of Nevada and elsewhere, JOSEPH DALY, acting on behalf of and at the knowing direction of JACK GORDON and SOL SAYEGH, did, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely, Bribery of a Public Officer, in violation of Nevada Revised Statutes, Section 197.020, wilfully and unlawfully travel from the State of California to the State of Nevada, and thereafter JOSEPH DALY, JACK GORDON and SOL SAYEGH did perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, including the following:

On or about July 27, 1978, defendant JOSEPH DALY, acting on behalf of and at the knowing direction of JACK

GORDON and SOL SAYEGH, wilfully and unlawfully offered a sum of money to Harry M. Reid, Chairman of the Nevada Gaming Commission, in exchange for favorable official action on the part of Harry M. Reid in regard to Commision approval of a new gaming device, in violation of Nevada Revised Statutes, Section 197.020.

On or about July 31, 1978, defendants JACK GORDON and SOL SAYEGH wilfully and unlawfully delivered a sum of money to Harry M. Reid with the intent to influence the official actions of Harry M. Reid as Chairman of the Nevada Gaming Commission, in regard to Commision approval of a new gaming device, in violation of Nevada Revised Statutes, Section 197.020.

All in violation of Title 18, United States Code, Sections 1952 and 2.

COUNT III
(Conspiracy)

The Grand Jury further charges: T H A T

From on or about July 24, 1978, and continuously thereafter up to and including July 31, 1978, in the District of Nevada and elsewhere, defendants JACK GORDON, SOL SAYEGH and JOSEPH DALY, wilfully and knowingly did combine, conspire, confederate and agree together with each other to commit offenses against the United States as follows:

To travel in interstate commerce and to use facilities in interstate commerce with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity,

namely: Bribery of a Public Officer, in violation of the laws of the State of Nevada and to thereafter perform and attempt to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of said unlawful activity, in violation of Title 18, United States Code, Section 1952.

It was part of this conspiracy that defendant JACK GORDON, having failed in his attempt to obtain approval from the Nevada Gaming Commission to distribute two new gaming devices through Aafran, a Nevada corporation, would, with the aid of defendants SOL SAYEGH and JOSEPH DALY, unlawfully influence certain members of the Nevada Gaming Commission to overturn the Commission's previous disapproval of the said distribution.

It was a further part of this conspiracy that defendants JACK GORDON and SOL SAYEGH would use defendant JOSEPH DALY to make the initial contact with certain members of the Nevada Gaming Commission for the purpose of offering them a sum of money in exchange for their favorable official action in placing the matter back on the agenda in less than the legally required time period of one year, and then overturn the commission's previous disapproval of the new gaming devices. Defendant JOSEPH DALY would then place the said Nevada Gaming Commissioners in direct contact with defendant JACK GORDON.

It was a further part of this conspiracy that defendants JACK GORDON and SOL SAYEGH would directly pay a sum of money to said Nevada Gaming Commissioners in exchange for their favorable official action in regard to the distribution of the new gaming devices in question.

Among the means by which the defendants would carry out this conspiracy were:

1. Defendant JOSEPH DALY, on behalf of defendants JACK GORDON and SOL SAYEGH, would attempt to

approach Nevada Gaming Commissioner George Swarts in an effort to unlawfully change George Swarts' vote concerning the distribution of the new gaming devices.

2. Defendant JOSEPH KALY, on behalf of defendants JACK GORDON and SOL SAYEGH, would approach Nevada Gaming Commission Chairman Harry M. Reid in an effort to unlawfully influence Harry M. Reid to place the matter of the distribution of the new gaming devices back on the Nevada Gaming Commisison agenda in less than the legally required time period of one year for reconsideration of the Commission's previous disapproval of the said distribution.

3. Defendant JOSEPH DALY would set up a meeting between Harry M. Reid and defendant JACK GORDON in order to execute the plan to bribe Harry M. Reid.

4. Defendant SOL SAYEGH would attempt to hold the meeting with Harry M. Reid at SOL SAYEGH's residence.

5. Defendants JACK GORDON and SOL SAYEGH would deliver a sum of money to Harry M. Reid for the express purpose of influencing Harry M. Reid's official actions as Chairman of the Nevada Gaming Commission.

In furtherance of this conspiracy, and to effect the objects thereof, in the District of Nevada and elsewhere, the defendants committed the following overt acts, among others:

1. On July 24, 1978, defendant JOSEPH DALY placed a telephone call to the office of Robert Broadbent.

2. On July 25, 1978, defendant JOSEPH DALY and Robert Broadbent spoke on the telephone.

3. On July 26, 1978, defendant JOSEPH DALY travelled by automobile from San Bernardino, California, to Las Vegas, Nevada.

4. On July 27, 1978, defendant JOSEPH DALY and Harry M. Reid held a conversation at Harry M. Reid's office in Las Vegas, Nevada.

5. On July 28, 1978, defendant JACK GORDON and Harry M. Reid spoke on the telephone.

6. On July 31, 1978, defendant SOL SAYEGH and Harry M. Reid spoke on the telephone.

7. On July 31, 1978, defendants JACK GORDON and SOL SAYEGH held a meeting with Harry M. Reid in Harry M. Reid's office in Las Vegas, Nevada.

All in violation of Title 18, United States Code, Section 371.

A TRUE BILL:

s/ Illegible
FOREMAN OF THE GRAND JURY

B. MAHLON BROWN
United States Attorney

s/ Illegible
Assistant United States Attorney